(5)

No. 92-8556

In The

# Supreme Court of the United States

October Term, 1993

KENNETH O. NICHOLS,

*Petitioner,*

vs.

UNITED STATES,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

## BRIEF OF THE PETITIONER


WILLIAM B. MITCHELL CARTER*
(Appointed by this Court)
404 James Building
735 Broad Street
Chattanooga, Tennessee 37402
615/265-2367

MARY JULIA FOREMAN
404 James Building
735 Broad Street
Chattanooga, Tennessee 37402
615/265-2367

*Counsel of Record
*Counsel for Petitioner*



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OR CALL COLLECT (402) 342-2831




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## QUESTION PRESENTED

WHETHER THE DISTRICT COURT IN CALCULATING PETITIONER NICHOLS' CRIMINAL HISTORY SCORE UNDER THE SENTENCING GUIDELINES IMPROPERLY CONSIDERED A PRIOR UNCOUNSELED MISDEMEANOR FOR WHICH HE HAD BEEN FINED BUT NOT IMPRISONED.

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## OPINIONS BELOW

The citation of the opinion of the District Court is: *U.S. v. Nichols*, 763 F. Supp. 277 (E.D.Tenn. 1991).

The citation of the Court of Appeals for the Sixth Circuit is: *United States v. Nichols*, 979 F.2d 402 (6th Cir. 1992).

## JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit affirming the judgment of the District Court was entered on the 6th day of November, 1992. A petition to rehear was timely filed. The Petition to Rehear was denied by order of the Court dated February 16, 1993. Jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254 providing in pertinent part for granting of review by writ of certiorari upon the petition of a party to a criminal case after rendition of judgment by the United States Court of Appeals. A Petition for Writ of Certiorari was filed on April 23, 1993. The Petition for Writ of Certiorari was granted on September 28, 1993.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America – Sixth Amendment:

**Rights of the accused:** In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitution of the United States of America – Fourteenth Amendment:

**§1 Citizenship – Due process of law – Equal protection.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

USSG 4A1.1 – **Criminal History Category**

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).



(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided* that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

USSG 4A1.2, comment. (Nov. 1990)

Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

## STATEMENT OF THE CASE

Petitioner pled guilty in the United States District Court for the Eastern District of Tennessee to conspiracy to possess cocaine with the intent to distribute in violation of 21 U.S.C. §846. He was sentenced to 235 months imprisonment and eight years supervised release. (J.A. 18, 19)

The presentence investigation report assessed petitioner one criminal history point for a 1983 state misdemeanor conviction for driving under the influence of alcohol (DUI) for which he was fined $250.00 but was not incarcerated.[1] (Presentence Report, p. 7). Petitioner objected to the inclusion of that conviction in the computation of his criminal history score because he was not represented by counsel when he was convicted of the previous DUI offense. (Defendant's objections to Presentence Report, page 5 & 6).

The Presentence Report indicated that no information was available from the Court record as to whether

[1] At the time of his conviction, Nichols faced up to one year imprisonment for a violation of *Georgia Code Annotated* §406-391 which provided as follows:

> "40-6-391. (a) A person shall not drive or be in actual physical control of any moving vehicle while:
> (1) Under the influence of alcohol; . . .
> (c) Every person convicted of violating this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than ten days nor more than one year, or by a fine of not less than $100.00 nor more than $1,000.00, or by both such fine and imprisonment. . . .



Nichols had been represented by an attorney. Nichols reported that he had contacted an attorney who said he did not need to be represented since he was pleading *nolo contendere* (Presentence Report, page 7).

The District Court made a finding that petitioner did not have counsel at his DUI trial, holding that waiver of counsel was unclear and could not be presumed from a silent record.[2] (Memorandum Opinion, District Judge, J.A. 10). The Court held that petitioner's uncounseled misdemeanor was properly included in his criminal history score. The score calculated in the Presentence Report caused petitioner to be in Criminal History Category III. If the prior uncounseled misdemeanor had not been included, petitioner would have been in category II. He was therefore subject to a sentence in the range of 188 months to 235 months as category III rather than the range of 168 months to 210 months in category II.

[2] Not only must a defendant be informed of his right to counsel before pleading guilty, he must make a knowing and intelligent waiver of that right on the record. *Boykin v. Alabama*, 395 U.S. 238 (1969). Such a waiver must be intelligently and understandingly made, and cannot be presumed from a silent record. *Boyd v. Dutton*, 405 U.S. 1 (1972). It was not contested in the proceedings below that Nichols did not have counsel. The District Court determined on the basis of facts before it that he did not waive the right to counsel. *U.S. v. Nichols* 763 F.Supp. 277 (E.D. Tenn. 1991).

## SUMMARY OF ARGUMENT

Petitioner urges that the Sentencing Guidelines of the United States Sentencing Commission are unconstitutional to the extent that they allow the use of a previous uncounseled conviction for which the petitioner received no actual imprisonment to add additional time to a later conviction. Petitioner advances three lines of argument to support his position:

### I.

*Baldasar v. Illinois*, 446 U.S. 222 (1980), is controlling precedent for this case. In this case, an uncounseled DUI conviction was used to raise the petitioner's criminal history score under the federal sentencing guidelines and subject him to an added 25 month prison term. Such enhancement of the petitioner's sentence was unconstitutional under the Sixth Amendment as interpreted by the Court in *Baldasar*. This case is similar to *Baldasar* factually and the principles for which *Baldasar* stands are directly applicable.

*Baldasar* followed several other Supreme Court decisions which have interpreted the Sixth Amendment right to counsel. Prior to *Baldasar*, in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court had held that a defendant had a right to counsel even in a misdemeanor case. In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court stated that this right applied only when the defendant was sentenced to actual imprisonment. In *Baldasar*, the Court held that using a previous uncounseled misdemeanor conviction to



enhance a subsequent prison sentence was also unconstitutional under the Sixth Amendment. Courts have disagreed, however, as to *Baldasar's* precedential value. Several circuit courts of appeal have, on at least one occasion, held that a previous uncounseled misdemeanor should not be used to collaterally enhance a defendant's sentence. Other circuits have disagreed and have essentially limited *Baldasar* to its facts. Numerous state courts, however, have properly followed *Baldasar*.

The Court should find *Baldasar* controlling in this case. Judge Jones, who dissented from the court's holding below, was correct that this case is significantly factually similar to *Baldasar*. In addition, the fact that this case does not involve an enhanced penalty statute, but the application of the federal sentencing guidelines, is a distinction without a constitutional difference. In both cases, the petitioner received additional imprisonment based on a previous uncounseled misdemeanor conviction.

The court below stated that since previous uncounseled misdemeanor convictions can be used for impeachment purposes, courts should be able to use such convictions to enhance subsequent prison sentences. In taking this position, however, the court has ignored the fact that under the federal sentencing guidelines, unlike in an impeachment situation, the court's discretion is severely limited. The Court has no discretion to disregard the increase in the defendant's sentencing range.

The guiding principle of the cases leading to *Baldasar* and *Baldasar* itself is that a defendant should not be imprisoned without the opportunity to be represented by counsel. Not only was the petitioner's sentence enhanced

in this case, but he could have received up to one year in prison for his previous misdemeanor conviction. Thus, even under the narrowest reading of the majority opinion in *Baldasar,* the view of Justice Blackmun, the petitioner's sentence should not have been enhanced because of the previous DUI conviction because he was subject to more than six months imprisonment. Since the previous conviction was also used to increase his sentence in this case, the enhancement was unconstitutional according to the view of the four other concurring Justices in *Baldasar.* Therefore, the previous uncounseled misdemeanor conviction should not have been considered to enhance petitioner's sentence in this case.

## II.

Nichols' prior uncounseled misdemeanor conviction should not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction under the federal sentencing guidelines. Even if Nichols' original conviction was constitutional under *Scott v. Illinois* because no sentence of imprisonment was imposed, its collateral use should be found to be unconstitutional if its collateral use results in an increased prison term. Even though this rule may create classes of convictions valid for one purpose and invalid for another, it preserves the integrity of the Sixth Amendment as interpreted in *Gideon v. Wainwright,* 372 U.S. 335 (1963), and *Powell v. Alabama,* 287 U.S. 45 (1932), and protects against the use of unreliable convictions to increase jail sentences collaterally. This will afford our citizens the protection of the Sixth Amendment while not imposing on the states the requirement that they provide counsel in every misdemeanor



case. Even though some offenses will therefore be unavailable to enhance punishment in state and federal recidivist statutes, this is appropriate because it will ensure that unreliable convictions are not used to automatically increase sentences under the federal sentencing guidelines or in state courts.

## III.

As set out above, we urge the Court to follow the precedent of *Baldasar* and hold that Nichols' previous uncounseled misdemeanor conviction cannot be used to increase his sentence under the federal sentencing guidelines. We urge that both of the above arguments are consistent with the holding of *Baldasar.* If for any reason the Court should decide that *Baldasar* should not be followed, then we urge the Court to adopt the following rule which would be a logical extension of the Supreme Court cases interpreting the Sixth Amendment right to counsel.

Nichols' uncounseled misdemeanor conviction should be held unconstitutional under the Sixth Amendment because imprisonment was authorized. The Sixth Amendment provides for the right to counsel in all criminal prosecutions. The plain wording of the Sixth Amendment has led the Court in *Gideon v. Wainwright* and later *Argersinger v. Hamlin* and *Scott v. Illinois* to acknowledge the right to counsel and then to limit that right to those cases where there is actual imprisonment. Petitioner urges that a rule using a standard of "authorized imprisonment" would also faithfully implement the principles of the Sixth Amendment.

The "authorized imprisonment" standard is a position consistent with the position taken by the American Bar Association and will not place too great a burden on the court system.

## ARGUMENT

### THE SIXTH AMENDMENT PROHIBITS THE USE OF AN UNCOUNSELED MISDEMEANOR IN SENTENCING IF THE INCLUSION UNDER THE SENTENCING GUIDELINES OF THE UNITED STATES SENTENCING COMMISSION RESULTS IN ANY INCREASE IN THE TERM OF IMPRISONMENT.

### I.

*Baldasar v. Illinois*, 446 U.S. 222 (1980) is controlling precedent for this case. In this case, the District Court allowed the use of a prior uncounseled misdemeanor for which the petitioner was sentenced only to a fine with no imprisonment to substantially increase the petitioner's sentence. Such enhancement was prohibited by the Court in *Baldasar*. In this case, the Court of Appeals refused to follow *Baldasar* by limiting *Baldasar* to its facts. However, as noted in the Sixth Circuit Court opinion of Judge Jones (who dissented from the majority on this issue), the factual similarities between *Baldasar v. Illinois*, and the present case are substantial. In addition, the principles asserted in *Baldasar* are directly applicable to this case and should not be restricted.

In *Baldasar* the defendant's sentence had been increased from a misdemeanor to a felony because of the consideration of a previous uncounseled misdemeanor



conviction. In this case, the petitioner's sentence was increased by 25 months as a direct result of the consideration of a previous uncounseled misdemeanor conviction. In this case, however, the increase was mandated by the federal sentencing guidelines. Under the sentencing guidelines, prior convictions have substantial impact on sentences because they automatically increase criminal history scores. The judge is allowed no exercise of discretion as to the range within which a defendant is sentenced. *See* United States Sentencing Commission, *Guidelines Manual*, Sec. 4A1.1 through 4A1.3. Because of this, the importance of the reliability of prior convictions is enhanced. Thus, the fact that the petitioner received an enhanced sentence in this case because of a previous uncounseled misdemeanor conviction is just as egregious as the facts in *Baldasar*.

#### A. Supreme Court Cases Leading to *Baldasar*

A number of Supreme Court cases interpreting the Sixth Amendment right to counsel led to the decision in *Baldasar*. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense." In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court extended the Sixth Amendment right to counsel to the states through the Fourteenth Amendment and held that the right to counsel included the right of an indigent to have counsel provided. In so doing, the Court overruled the case of *Betts v. Brady*, 316 U.S. 455 (1942), which had acknowledged the right to counsel but had concluded that the appointment of counsel was not a fundamental

right and thus was not made obligatory on the states by the Fourteenth Amendment.

The Court in *Gideon*, holding that the Sixth Amendment right to counsel was a fundamental right, noted as follows:

> . . . In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions have laid great emphasis on procedural and substantive safeguards designed to ensure fair trials before impartial tribunals in which every defendant stands equal



> before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him . . .

*Gideon v. Wainwright*, 372 U.S. at 344-345 (1963).

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Supreme Court held that the right to counsel arose even in misdemeanor cases. In *Argersinger*, the petitioner was charged in Florida with the misdemeanor of carrying a concealed weapon, an offense punishable by imprisonment up to six months, a $1,000.00 fine or both. The trial was before a judge; the petitioner was unrepresented by counsel. He was sentenced to serve 90 days in jail. The Florida Court in a proceeding on a *habeas corpus* petition had held that the right to appointed counsel only extended to trials "for non-petty offenses punishable by six month imprisonment." 236 So. 2d 442, 443. This Court held in *Argersinger* that " . . . absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 92 S.Ct. at 2012 (1972).[3] In both *Argersinger* and *Gideon v. Wainwright*, the Court referred to the basic principles found in *Powell v. Alabama*, 287 U.S. 45, 68 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right

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[3] Justice Brennan joined by Justices Marshall and Stevens note in the dissent in *Scott v. Illinois*, 440 U.S. 367, 379 (1979) that *Argersinger* held only that an indigent defendant is entitled to appointed counsel, even in petty offenses punishable by six months of incarceration or less, if he is likely to be sentenced to incarceration for any time if convicted.

to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, of those of feeble intellect."

In *Scott v. Illinois*, 440 U.S. 367 (1979) the Supreme Court limited the holding of *Argersinger* to require counsel only when there is an actual sentence of imprisonment imposed.[4] Justice Rehnquist stated the ruling of the Court as follows:

> Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of *Argersinger* – that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of *actual imprisonment as the line defining the constitutional right to appointment of counsel. Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States. We therefore *hold that the Sixth and Fourteenth Amendments* to the United States Constitution *require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel* in his defense.

[4] Scott, who was convicted of shoplifting and thus subject to imprisonment under Illinois law, was fined but not sentenced to imprisonment.



*Scott*, 440 U.S. at 373-374 (Emphasis added).

Justice Powell concurred, but felt that a more flexible rule should allow more discretion by the trial court. *Scott*, 440 U.S. at 374-75.

Justice Brennan, joined by Justices Marshall and Stevens, dissented noting that the Sixth Amendment provides for counsel in all criminal prosecutions. He argued that *Gideon* held representation by counsel was a fundamental right that was essential to a fair trial and that *Argersinger* was a cautious step toward the logical consequences of *Gideon's* rationale, that the right to counsel should apply to all state criminal prosecutions. He read *Argersinger* as establishing a "two dimensional" test for right to counsel 1) if a "non-petty" offense punishable by over six months in jail (where there is a due process right to jury trial) or 2) for any offense where incarceration is likely regardless of the maximum authorized penalty.

Therefore, Justice Brennan concluded that even under *Argersinger* the petitioner in *Scott* would prevail because he faced an offense punishable by up to one year in jail.

Justice Blackmun dissented proposing the following rule:

> Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months' imprisonment, . . . or whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment. . . .

*Scott*, 440 U.S. at 389-390 (citations omitted). He felt that this would provide a "bright line" rule for trial and appellate courts to follow.

### B. *Baldasar*

Following *Argersinger* and *Scott* came *Baldasar v. Illinois*. Illinois law provided that misdemeanor theft was punishable by not more than one year in prison but that on a second conviction for the same offense the charge became a felony punishable by three years imprisonment. Baldasar was convicted, was not represented by counsel, and did not waive the right to counsel in a previous case in May of 1974. He was fined $159.00 and sentenced to one year probation. Subsequently, in November of 1975, he was charged with stealing a shower head. This offense became a felony under Illinois enhancement law. *Baldasar*, 446 U.S. at 223.



Defense counsel unsuccessfully argued in the trial court that because Baldasar had not been represented by counsel at the first proceeding, the conviction was too unreliable to support enhancement for the second misdemeanor. Baldasar was convicted of the felony and the Illinois Appellate Court affirmed in a divided vote. The United States Supreme Court reversed with its reasoning set out in three separate concurring opinions.

Justice Stewart, joined by Justices Brennan and Stevens, found that the Sixth and Fourteenth Amendments to the United States Constitution required that an indigent defendant sentenced to a term of imprisonment be afforded counsel, that Baldasar's sentence was increased only because of his previous conviction, and thus the rule of *Scott v. Illinois* was violated.

Justice Marshall joined by Justices Brennan and Stevens, traced the history of the right to counsel from the Sixth Amendment, *Gideon*, *Argersinger* and *Scott*, and concluded:

> "Nevertheless, even if one accepts the line drawn in *Scott* as the constitutional rule applicable to this case, I think it plain that petitioner's prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction.

*Baldasar v. Illinois*, 446 U.S. at 228.

Recognizing the argument made by Justice Powell in his dissenting opinion, Justice Marshall commented as follows:

"Mr. Justice Powell's dissenting opinion- . . . asserts the result (receiving two additional years under the Illinois enhancement statute) is constitutionally permissible because under the enhancement statute the increased punishment was imposed for the second offense rather than the first. I agree that the increased prison sentence in this case is not an enlargement of the sentence for the original offense. If it were, this could be a double jeopardy case. But under the recidivist clause of the Illinois statute, if the State proves a prior conviction for the same offense a completely different range of sentencing options, including a substantially longer term of imprisonment, becomes available. The sentence petitioner actually received would not have been authorized by statute but for the previous conviction. It was imposed as a direct consequence of that uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*.[5]

*Baldasar*, 446 U.S. at 227.

Justice Blackmun following the "bright line" approach which he advocated in *Scott*, concurred because Baldasar was prosecuted for an offense punishable by more than six months imprisonment.

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[5] The parallel between *Baldasar* and this case is here made apparent. Nichols' guideline range as a level 34, criminal history category III offender was 188 to 235 months. If he had not received one point on his criminal history score for the uncounseled misdemeanor, he would have been in category II and his sentencing range would have been 168 to 210 months. He was sentenced at the top of his range where the difference of time imposed was twenty-five months.



Justice Powell joined by the Chief Justice, Justice White and Justice Rehnquist dissented. They viewed the conviction of Baldasar as valid without counsel under *Scott* and if constitutional initially, valid to sustain a repeat offender law. They argued that the majority opinion created a new hybrid of offenses: judgments valid for purposes of their own penalties (as long as the defendant receives no prison term) yet invalid for the purpose of enhancing punishment upon a subsequent conviction. *Baldasar*, 446 U.S. at 232. Those dissenting justices appeared to recognize that there is a policy argument that uncounseled misdemeanors are too unreliable to support enhancement, *see* 446 U.S. at 233, but feared that such a ruling would create confusion in the lower courts and make deterrence of recidivists more difficult. In addition, the ruling of the majority was criticized as the genesis of further litigation claiming uncounseled misdemeanor convictions cannot be used to impeach a defendant's testimony or litigation concerning the admissibility of such convictions in discretionary sentencing determinations.

### C. Interpretations of *Baldasar* by the Circuit Courts of Appeal

There is a split among the circuit courts of appeal concerning the holding of *Baldasar*. The court below chose to follow the Fifth Circuit's very narrow interpretation of *Baldasar*. Such an interpretation, however, has not been followed by all the circuits, is not an accurate reading of *Baldasar*, and is not in keeping with the Supreme Court decisions leading up to *Baldasar*.

### 1. Circuit Court Decisions Which Have Followed *Baldasar*

Several circuit courts of appeal have, on at least one occasion, properly followed *Baldasar* and have held that previous uncounseled misdemeanor convictions for which there was no valid wavier may not be used to increase imprisonment for a subsequent offense. *See United States v. Norquay*, 987 F.2d 475 (8th Cir. 1993); *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991); *Moore v. Jarvis*, 885 F.2d 1565 (11th Cir. 1989)[6]; *Wang v. Withworth*, 811 F.2d 952 (6th Cir. 1987). In *Brady*, a case similar to both *Baldasar* and the instant case and which dealt with the proper application of the federal sentencing guidelines, two previous uncounseled misdemeanor convictions were taken into consideration by the district court to enhance the defendant's sentence for voluntary manslaughter and assault with a dangerous weapon. The Ninth Circuit vacated the district court's decision and remanded the case. The court held that an upward departure in the defendant's criminal history category based on the previous misdemeanor convictions was not justified because, among other things, the defendant's convictions were obtained in uncounseled proceedings. The Ninth Circuit held that any "term of imprisonment imposed on the basis of an uncounseled conviction where the defendant did not waive counsel violates the Sixth Amendment

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[6] It is unclear in *Black v. Florida*, 935 F.2d 206 (11th Cir. 1991), whether the Eleventh Circuit Court of Appeals has narrowed its interpretation of *Baldasar* since its decision in *Moore v. Jarvis*.



under *Baldasar.*" *Brady*, 928 F.2d at 854. In an earlier decision of the Ninth Circuit, the court had stated:

> The consensus of [the *Baldasar*] concurrences is that an uncounseled conviction which is invalid for the purposes of imposing a sentence of imprisonment, though valid in itself for imposing a nonprison sentence, is also invalid for enhancing a sentence of imprisonment.

*United States v. Williams*, 891 F.2d 212, 214 (9th Cir. 1989), *cert. denied*, 494 U.S. 1037 (1990).

In *United States v. Norquay*, the Eighth Circuit followed the Ninth Circuit's holding in *Brady*. In *Norquay*, the defendants had been convicted of aggravated sexual abuse. The court held that prior tribal court convictions could not be a basis for an upward departure under the federal sentencing guidelines as to a subsequent conviction, absent, among other things, a finding as to whether the defendant had been represented by counsel in the tribal court. The court stated:

> The Supreme Court has stated that misdemeanor convictions obtained in the absence of counsel for the defendant may not be used as a basis for enhancing a sentence of imprisonment to be imposed upon a defendant. *See Baldasar v. Illinois* . . .

*Norquay*, 987 F.2d at 481.

In *Santillanes v. United States Parole Com'n*, 745 F.2d 887 (10th Cir. 1985), the Tenth Circuit Court of Appeals interpreted *Baldasar* more narrowly than the Ninth Circuit but did not limit *Baldasar* to its facts. In *Santillanes* the court stated:

> . . . the holding in *Baldasar* is Justice Blackmun's rationale that an invalid uncounseled conviction cannot be used to enhance a subsequent conviction.
>
> Certain conclusions follow from these decisions by the Supreme Court. When the proper use of the prior constitutionally infirm conviction depends upon its reliability rather than the mere fact of conviction, the use of that conviction to support guilt or enhance punishment is unconstitutional because it erodes the safeguard announced in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct.792, 9 L.Ed.2d 799 (1963).

*Santillanes*, 745 F.2d at 887.

Finally, in an earlier decision of the Sixth Circuit, *Wang v. Withworth*, 811 F.2d 952 (6th Cir. 1987), the court interpreted *Baldasar* much more broadly than it has in the instant case. In *Wang*, the defendant was convicted and sentenced to 30 days in prison for misdemeanor theft. The defendant was tried twice. In both trials, a 1980 uncounseled misdemeanor conviction for shoplifting was proffered as the prior conviction element of the enhanced felony indictment. The Sixth Circuit stated,

> It does not matter that Wang's prior misdemeanor conviction did not result in imprisonment. *Baldasar* clearly prevents the use of that uncounseled conviction to subject Wang to the possibility of increased imprisonment at a subsequent trial.

*Wang v. Withworth*, 811 F.2d at 956. The court also noted that *Baldasar* focused on imprisonment after the second conviction rather than imprisonment after the first. *Id* at 956 n. 5.



### 2. Circuit Court Decisions Which Have Not Followed *Baldasar*

Unfortunately, some courts of appeal, like the Fifth Circuit, have severely limited the scope of the application of *Baldasar*. The Fifth Circuit has held that a court may consider during sentencing a criminal defendant's prior uncounseled misdemeanor conviction for which the defendant did not receive a term of imprisonment. *See United States v. Follin*, 979 F.2d 369 (5th Cir. 1992); *United States v. Eckford*, 910 F.2d at 216, 220 (5th Cir. 1990); *Wilson v. Estelle*, 625 F.2d at 1158, 1159 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). In *United States v. Castro-Vega*, 945 F.2d 496 (2d Cir. 1991), the Second Circuit found that there was "no common denominator [in *Baldasar*] applicable to this case" and limited *Baldasar* to its facts. In *United States v. Falesbork*, 1993 WL 331481 (4th Cir. 1993), the Fourth Circuit stated that the holding of *Baldasar* "is limited to prohibiting the elevation of a misdemeanor to a felony by reason of an uncounseled conviction that could have resulted in imprisonment for more than six months."

The Fifth and Second Circuits are incorrect in finding no common denominator in *Baldasar*. Even given the differences in the opinions of the Justices, a majority of the Court believed that a court should not consider during sentencing a defendant's prior uncounseled misdemeanor conviction for which the defendant could have received imprisonment exceeding six months.

*Eckford* and *Wilson* are factually distinguishable from the instant case. In *Eckford*, the defendant's previous uncounseled misdemeanor was not an offense punishable by more than six months imprisonment. *Eckford*, 910 F.2d

at 217. In fact, the court noted that even if it were to accept Justice Blackmun's concurrence as the view of the Court in *Baldasar, Baldasar* would not be applicable in *Eckford,* because the defendant's previous misdemeanor conviction had not carried with it potential imprisonment exceeding six months. *Wilson* is distinguishable from the instant case in that it did not involve an application of the federal sentencing guidelines. Two other Fifth Circuit cases interpreting *Baldasar* are also pre-sentencing guidelines cases. *See Thompson v. Estelle,* 642 F.2d 996 (5th Cir. 1981); *United States v. Smith,* 844 F.2d 203 (5th Cir. 1988).

*Follin, Falesbork* and *Castro-Vega* appear to have been factually similar to the instant case. The courts, however, limited *Baldasar* to its facts and incorrectly held that using an uncounseled misdemeanor conviction to enhance a sentence which would be a felony even without the enhancement, was not prohibited by *Baldasar. See, e.g. Follin,* 979 F.2d at 376 n. 8; *Castro-Vega,* 945 F.2d at 500; *Falesbork,* 1993 WL 331481 (4th Cir. 1993). To hold that increasing a defendant's prison sentence is permissible if the second offense is already a felony rather than a misdemeanor is a "distinction without a constitutional difference." This line of reasoning does not properly acknowledge that it is *imprisonment* based on an uncounseled conviction which is unconstitutional.[7]

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[7] In *State v. O'Brien,* 666 S.W.2d 484 (Tenn. Crim. App. 1984), the court adopted the reasoning of the New Mexico Court of Appeals which showed that the emphasis in *Baldasar* is on the fact of imprisonment. In *O'Brien,* the Court said:

> In *State v. Ulibarri,* 96 N.M. 511, 632 P.2d 746, 747-748 (1981), the Court held:
> We read *Baldasar* to mean that even if the enhanced offense is a misdemeanor with a light penalty, an accused may not be sentenced to serve a term of imprisonment unless he was afforded the benefit of assistance of counsel in the prior as well as the predicate offense. All instances where an enhancement follows a prior offense in which the defendant did not have the assistance of counsel in his defense are controlled by *Baldasar.* The fact of the prison term and not the gravity of the offense is the controlling criterion.



In a number of cases, the courts have chosen not to follow *Baldasar* because the uncounseled misdemeanor convictions at issue were being used collaterally for some purpose other than to enhance punishment, *see e.g., United States v. Peagler,* 847 F.2d 756, 758 (11th Cir. 1988) (per curiam) (allowing reliance on uncounseled convictions, but only "as they related to defendant's character, and . . . reputation"); *Charles v. Foltz,* 741 F.2d 834 (6th Cir. 1984), *cert. denied,* 469 U.S. 1193 (1985) (use of uncounseled misdemeanor convictions may be used for impeachment); *Schindler v. Clerk of Circuit Court,* 715 F.2d 341 (7th Cir. 1983), *cert. denied,* 465 U.S. 1068 (1984) (use of subsequent criminal sanction predicated on the defendant's status as an adjudicated offender, not on the reliability of initial civil forfeiture proceedings),[8] or the case was

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[8] In *Schindler,* the court stated that it was following the reasoning in *Lewis v. United States,* 100 S.Ct. 915 (1980), in which a prior uncounseled felony conviction was used for a purpose other than to support guilt or to enhance punishment for a subsequent offense. In *Lewis,* the uncounseled conviction served as the basis for classifying an individual as a convicted felon and subjecting him to criminal liability for possession of firearms under 18 U.S.C. App. §12029(a)(1). The *Schindler* Court stated:

> The Court explained that enforcement of the firearms disability by means of a criminal sanction was permissible because the previous uncounseled

significantly different factually. *See, e.g., United States v. Robles-Sandoval,* 637 F.2d 692 (9th Cir. 1981), *cert. denied,* 451 U.S. 941 (1981) (in deportation case, court stated that criminal law cases such as *Baldasar* relied on by appellant had little force beyond the area itself and that validity of initial deportation order was not questioned). These cases have little precedential value because in the instant case the previous uncounseled misdemeanor conviction is being used to enhance punishment and this case is factually very similar to *Baldasar.*

### D. Interpretation of *Baldasar* by State Courts

A large number of state courts have followed *Baidasar* either explicitly or implicitly.[9] A number of courts have

> conviction was not being used to "support guilt or enhance punishment." 445 U.S. at 67, 100 S.Ct. at 992 (quoting *Burgett, supra,* 389 U.S. at 115, 88 S.Ct. at 262), but merely to identify the class of individuals who, because they were potentially dangerous, should therefore be disabled from possession of firearms.

[9] *See, e.g. Pananen v. State,* 711 P.2d 528, 532 (Alaska Ct. App. 1985); *Lovell v. State,* 678 S.W.2d 318, 320 (Ark. 1984); *State v. Natoli,* 764 P.2d 10, 12 (Ariz. 1988); *Krewson v. State,* 552 A.2d 840, 841 (Del. 1988); *State v. Beach,* 592 So.2d 237 (Fla. 1992); *Hlad v. State,* 585 So.2d 928, 930 (Fla. 1991); *State v. Vares,* 801 P.2d 555, 557-558 (Haw. 1990); *State v. Hoglund,* 785 P.2d 1311, 1313 (Haw. 1990); *People v. Finley,* 568 N.E.2d 412 (Ill. App. 1991); *State v. Cooper,* 343 N.W.2d 485, 486 (Iowa 1984); *State v. Grogan,* 385 N.W.2d 254, (Iowa 1987); *State v. Wiggins,* 399 So.2d 206, 207 (La. 1981); *State v. Lawrence,* 600 So.2d 1341 (La. Ct. App. 1991); *Newell v. State,* 277 A.2d 731, 738 (Me. 1971); *People v. Olah,* 298 N.W.2d 422 (1980), *cert denied,* 450 U.S. 957, 101 S.Ct. 1415, 67



held that an uncounseled misdemeanor conviction without a valid waiver cannot be used to collaterally increase a defendant's prison sentence. For instance, in *State v. Laurick,* 575 A.2d 1340 (N.J. 1990), the Supreme Court of New Jersey held that a prior uncounseled DWI conviction could be used to establish repeat offender status for the purposes of enhanced penalty provisions, as long as the defendant did not suffer an increased period of incarceration as a result of the failure of the court to inform the defendant of his right to counsel which led to the uncounseled DWI conviction. The court found *Baldasar* applicable and said:

> . . . We are satisfied that there is a core value to *Baldasar* that we should follow: that an uncounseled conviction without waiver of the right to

L.Ed.2d 381 (1981); *People v. Butler,* 96 A.D.2d 140, 468 N.Y.S.2d 274 (N.Y. 1983); *State v. Ulibarri,* 632 P.2d 746, 747 (N.M. 1981); *City of Pendleton v. Standerfer,* 688 P.2d 68, 70 (Or. 1984); *In re: Kean,* 520 A.2d 1271 (R.I. 1987); *State v. O'Brien,* 666 S.W.2d 484, 485 (Tenn. Crim. App. 1984); *State v. Triptow,* 770 P.2d 146, n. 3 (Utah 1989); *Sargent v. Commonwealth,* 360 S.E.2d 895, 902 (Va. Ct. App. 1987); *People v. Martinez,* 485 N.W.2d 124 (Mich. Ct. App. 1992); *People v. Stratton,* 384 N.W.2d 83, 87 (Mich. Ct. App. 1985); *State v. Nordstrom,* 331 N.W.2d 901 (Minn. 1983); *State v. Fussy,* 467 N.W.2d 601 (Minn. 1991); *State v. Wilson,* 684 S.W.2d 544, 547 (Mo. Ct. App. 1984); *State v. Orr,* 375 N.W.2d 171 (N. D. 1985); *State v. Smith,* 329 N.W.2d 564 (Neb. 1983); *State v. Reimers,* 496 N.W.2d 518 (Neb. 1993); *State v. Novak,* 318 N.W.2d 364 (Wis. 1982); *State v. Armstrong,* 332 S.E.2d 837, 841 (W.Va. 1985); *Laramie v. Cowden,* 777 P.2d 1089, 1090 (Wyo. 1989); *contra, Moore v. State,* 352 S.E.2d 821 (1987), 484 U.S. 904 (1987); *Sheffield v. City of Pass Christian,* 556 So.2d 1052 (Miss. 1990); *Commonwealth v. Thomas,* 507 A.2d 57 (Pa. 1986); *State v. Chance,* 405 S.E.2d 375 (S.C. 1991) *cert. denied,* 112 S.Ct. 1241 (1992); *State v. Grondin,* 563 A.2d 435 (N.H. 1989).

> counsel is invalid for the purpose of increasing a defendant's loss of liberty.

*State v. Laurick*, 575 A.2d at 1347.

In *State v. Oehm*, 680 P.2d 309 (Kan. Ct. App. 1984), the defendant was convicted of driving while under the influence of alcohol and sentenced as a second offender to 90 days imprisonment and additional penalties. The imprisonment portion of the defendant's sentence was imposed by the trial court in compliance with the statutory mandate for second offenders. The court found *Baldasar* applicable and stated:

> . . . The sum and substance of the decision is set forth in another concurring opinion where it is said, "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." Adoption of a rule holding a conviction invalid for imposing a prison term collaterally was rejected.

*State v. Oehm*, 630 P.2d at 312. As a result of the court's interpretation of *Baldasar*, it vacated the imprisonment portion of the defendant's sentence and remanded the case for appropriate resentencing. In *State v. Priest*, 722 P.2d 579 (Kan. 1986), the Supreme Court of Kansas, followed the reasoning in *Oehm*. In *Priest*, the defendant who had completed one DUI diversion program and pleaded *nolo contendere* to a second DUI charge, was sentenced as a first time DUI offender by the District Court and the State appealed. The court dismissed the State's appeal stating:



> . . . The judge correctly determined that a sentence of imprisonment for DUI conviction may not be enhanced under K.S.A. 1985 Supp. 8-1567 where the record of the prior diversion agreement is silent as to whether the defendant either had or waived the right to assistance of counsel under the Sixth Amendment of the United States Constitution.

*State v. Priest*, 722 P.2d at 579.

Some state courts have followed Blackmun's six month rule. For instance, in *State v. Beach*, 592 So.2d 237 (Fla. 1992), the Supreme Court of Florida followed its reasoning in an earlier decision stating:

> In *Hlad v. State*, 585 So.2d 928, 930 (Fla. 1991), this Court applied Justice Blackmun's bright-line rule to determine that a defendant's prior uncounseled DUI conviction was valid for enhancement "because he did not receive imprisonment nor could he have been imprisoned for more than six months as a result of the uncounseled conviction." Following the reasoning in *Hlad* and *Baldasar*, if Beach was entitled to counsel for the offenses included on his guidelines scoresheet, then these uncounseled convictions would be invalid for purposes of scoring.

*State v. Beach*, 592 So.2d at 239. In *Commonwealth v. Thomas*, 510 Pa. 106, 57 A.2d 57 (1986), the court held that uncounseled prior convictions may be used to enhance custodial penalties unless the earlier offense was punishable by more than six months' imprisonment.

Some courts, have found the use of an uncounseled misdemeanor for increasing a subsequent prison sentence

unconstitutional under both the Federal and State constitutions. In *State v. Dowd*, 478 A.2d 671 (Me. 1984), the Supreme Judicial Court of Maine held that the use of a prior adjudication for driving under the influence, in which the defendant was not represented by counsel, to enhance a penalty imposed for conviction of operating while the defendant's license was suspended violated the defendant's right to due process of law under the Federal and State Constitutions. The court reasoned that in *Dowd*,

> . . . A prior uncounseled conviction or adjudication directly results in enhancement of the penalty to be imposed. This result is contrary to the teaching of *Baldasar* and its predecessors that an uncounseled conviction cannot be used to enhance penal sanctions in a later criminal proceeding, and violates the due process clause of our state constitution.

*State v. Dowd*, 478 A.2d at 678.

In *State v. Orr*, 375 N.W.2d 171 (N.D. 1985), the court interpreted *Baldasar* to stand for Blackmun's view, but relied on its state constitution to expand the prohibition of enhanced prison terms based on any uncounseled prior convictions absent waiver.

### E. Conclusion

Based on the above analysis, Petitioner Nichols urges that the Court find *Baldasar* controlling in this case and that the sentencing guidelines both before and after their revision, to the extent that they allow consideration of uncounseled misdemeanors, are unconstitutional as a



violation of the Sixth Amendment right to counsel.[10] Circuit Judge Jones was correct in his analysis of the case law and correct in the view that *Baldasar* controls in the Nichols case.

After reviewing the history of cases including *Gideon, Argersinger, Scott* and *Baldasar* and in particular the varied holdings of *Baldasar*, Judge Jones remained convinced that even a narrow reading of *Baldasar* supported Nichols' contentions. He analyzes as follows:

> The parallels between *Baldasar*, and the instant case are substantial: in both cases the defendant was convicted of a misdemeanor for which no counsel was provided and for which the defendant did not waive the right to counsel; similarly, in both cases the defendant's term of imprisonment upon a subsequent conviction was enhanced based upon the prior uncounseled misdemeanor conviction. I can discern no

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[10] At the time of Nichols' offense the Criminal History section of the United States Sentencing Commission Sentencing Guidelines in application note 6 of §4A1.2 provided as follows:

*Invalid Convictions:* . . . Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score. Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in a criminal history score . . .

Effective November 1990, after the offense but before Nichols' sentencing hearing, the commentary to the guidelines was amended. The Background note to the commentary provided as follows:

*Background:* Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

logical or principled basis upon which to distinguish *Baldasar* from the case at bar. That the sentence enhancement in *Baldasar* resulted under an enhanced penalty statute that converted defendant's misdemeanor into a felony, while the instant case arises under the criminal-history provisions of the sentencing guidelines, is a distinction without a constitutional difference. The right to counsel recognized in *Argersinger* is grounded in the realization that a defendant, unaided by counsel, is simply unequipped to prepare his or her defense, thus making the uncounseled conviction inherently unreliable. *See Argersinger,* 407 U.S. at 31-32. "Left without the aid of counsel [a defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Powell v. Alabama,* 287 U.S. 45, 69 (1932). This unreliability reaches constitutional magnitude where the conviction results in the deprivation of liberty; whether this deprivation is imposed directly or collaterally is analytically irrelevant. *See State v. Laurick,* 575 A.2d 1340, 1347 (J.J. 1990), *cert. denied,* 111 S. Ct. 429 (1990); *State v. Priest,* 722 P.2d 576, 578-79 (Kan. 1986); *State v. Dowd,* 478 A.2d 671, 678 (Me. 1984). If an uncounseled conviction cannot, consistent with the Sixth Amendment, support a term of imprisonment initially, the existence of a subsequent conviction does not make an increased term of imprisonment based on that conviction constitutionally more palatable. Accordingly, I conclude that the district court erred in counting Nichols' prior uncounseled misdemeanor conviction in calculating his criminal history score under the sentencing guidelines.



Petitioner respectfully urges that Judge Nelson (who was joined by Judge Lively) failed to follow the decision in *Baldasar* in reaching his conclusion. Judge Nelson noted that evidence of prior uncounseled misdemeanor convictions for which imprisonment was not imposed can be used for impeachment purposes. Therefore, it would be appropriate for the court to consider Nichols' previous DUI in setting an appropriate sentence.

In taking this position, however, the court has ignored the fact that under the sentencing guidelines, the existence of a prior conviction is not something for a judge to "consider" in determining the sentence in the sense that there is discretion. In the petitioner's case, his prior uncounseled misdemeanor conviction for which he was fined but not sentenced to prison, automatically qualified him for a higher sentencing range which on the high end of the range was twenty five months longer than it would have been without considering the conviction. The use of uncounseled misdemeanors for impeachment is discretionary, and, therefore, is distinguishable from the facts of this case. It is not necessary to reach the question of the admissibility of uncounseled misdemeanors for impeachment purposes as a consequence of the decision in this case. The weight to be given uncounseled misdemeanor convictions for impeachment purposes is a matter of discretion of the trier of fact. When used for impeachment, an uncounseled misdemeanor does not have the "automatic" effect of increasing a defendant's sentence which arises under the guidelines.

The Petitioner urges that the increase in his sentence of twenty-five months under the guidelines was an automatic adjustment of sentencing range with consequences just as severe as the increase in imprisonment Baldasar faced in having his misdemeanor increased to a felony. This is significantly different from the situation which existed pre-guidelines and which presently exists in some state courts where judges have discretion in the amount of weight to give prior convictions. If the sentencing judge has discretion, he or she might conclude that a prior uncounseled misdemeanor has little or no reliability and that it should, therefore, be given little or no weight in the sentencing decision.

In sum, the guiding principle of the cases leading to *Baldasar* and *Baldasar* itself is that a defendant should not be imprisoned without the opportunity to be represented by counsel. Not only was the petitioner's sentence enhanced in this case, but he could have received up to one year in prison for his previous misdemeanor conviction.[11] Thus, even under the narrowest reading of the majority opinion in *Baldasar*, the view of Justice Blackmun, the petitioner's sentence should not have been enhanced because of the previous DUI conviction because Nichols was subject to more than six months imprisonment. Since the previous conviction was also used to increase his sentence in this case, the enhancement was unconstitutional according to the view of the four other concurring Justices in *Baldasar*. Therefore, the previous uncounseled misdemeanor conviction should not have

[11] See Footnote 1.



been considered to enhance petitioner's sentence in this case.

## II.

Nichols' prior uncounseled misdemeanor conviction should not have been used collaterally to impose an increased term of imprisonment upon a subsequent conviction under the federal sentencing guidelines. As seen from the above analysis of cases, *Gideon* held that appointment of counsel was "fundamental and essential" to a fair trial and should therefore be made applicable to the states through the Fourteenth Amendment. *Argersinger* rejected a distinction between felonies and petty offenses holding that "no person may be imprisoned for any offense. . . . unless he was represented by counsel at his trial." Even though *Scott* has limited the right to those cases where there was actual imprisonment, there is actual imprisonment when an uncounseled misdemeanor is used collaterally to increase punishment in a later proceeding. Thus, even if Nichols' original conviction was constitutional under *Scott v. Illinois* because no sentence of imprisonment was imposed, his sentence in this case should be found to be unconstitutional because the collateral use of the previous uncounseled conviction in sentencing resulted in an increased prison term. This is exactly the position taken by Justices Marshall, Brennan and Stevens in the *Baldasar* opinion. Their holding is consistent with the theoretical underpinnings of *Gideon*, *Powell* and *Argersinger* in preventing reliance on unreliable, uncounseled convictions. Even though this rule may create classes of convictions valid for one purpose and invalid for another, it preserves the integrity of the Sixth

Amendment as interpreted in *Gideon v. Wainwright* and *Powell v. Alabama* and protects against the use of unreliable convictions to increase jail sentences collaterally.

Further, this rule will afford our citizens the protection of the Sixth Amendment while not imposing on the states the requirement that they provide counsel in every misdemeanor case. Even though some offenses will therefore be unavailable to enhance punishment in state and Federal recidivist statutes, that is a small price to pay for ensuring that unreliable convictions are not used to automatically increase sentences under the Federal Sentencing Guidelines.

## III.

As set out above, we urge the Court to follow the precedent of *Baldasar* and hold that the uncounseled misdemeanor conviction cannot be used to increase Nichols' sentence under the federal sentencing guidelines. We urge that both of the above arguments are consistent with the holding of *Baldasar*. If for any reason the Court should decide that *Baldasar* should not be followed, then we urge the Court to adopt the following rule which would be a logical extension of the Supreme Court cases interpreting the Sixth Amendment right to counsel.

Uncounseled misdemeanor convictions should be unconstitutional initially under the Sixth Amendment if any imprisonment is authorized. The Sixth Amendment provides for the right of counsel in all criminal prosecutions. The plain wording of the Sixth Amendment has led the Court in *Gideon v. Wainwright* and later in *Argersinger v. Hamlin* and *Scott v. Illinois* to acknowledge the right to



counsel and then to limit that right to those cases where there is actual imprisonment. Since the right to counsel is fundamental and essential to a fair trial, we urge that Justice Brennan's view in his dissent in Scott, which was joined by Justices Marshall and Stevens, is a correct view. A standard based on "authorized imprisonment" would also implement the express provisions of the Sixth Amendment. It presents fewer problems of administration because the trial judge will not have to make any "preliminary" decisions as to whether incarceration is likely. If the offense subjects the defendant to any possible imprisonment, then counsel is to be provided.

This position is consistent with the position taken by the American Bar Association on August 8, 1990, in the Standards for Criminal Justice Providing Defense Services, Third Edition which provides as follows:

> Standard 5-5.1 Criminal Cases
> Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to incarceration.

In the commentary to this section the following is found:

> Standard 5-5.1 does not expressly apply to cases punishable only by a fine, although it can be argued that counsel is necessary in such proceedings in order to assure fair trials, just as in cases involving the possibility of imprisonment. The standard, however, does state that counsel

> should be provided "if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to imprisonment." The standard thus covers what may be termed "imprisonment once removed" situations. For example, counsel is required under this standard when a conviction can be used in a subsequent proceeding so as to apply a recidivist statute and thereby lead to imprisonment.

Thereafter the commentary notes that *Baldasar* is consistent with this standard. Petitioner urges that a rule using a standard of an "authorized imprisonment" also implements the principles of the Sixth Amendment.

Though some fear that the "authorized imprisonment" standard may place too great a burden on the court system, this is unlikely. In *Scott*, Justices Brennan, Marshall and Stevens pointed out that even if an authorized imprisonment standard was used, there would not be too great a burden on the courts. In their dissent in *Scott* they stated:

> Perhaps the strongest refutation of respondent's alarmist prophecies that an authorized imprisonment standard would wreak havoc on the States is that the standard has not produced that result in the substantial number of States that already provide counsel in all cases where imprisonment is authorized – States that include a large majority of the country's population and a great diversity of urban and rural environments. Moreover, of those States that do not yet provide counsel in all cases where *any* imprisonment is authorized, many provide counsel when periods of imprisonment longer than 30 days, 3 months, or 6 months are authorized. In fact, Scott would be entitled to appointed counsel under the current laws of at least 33 States.



*Scott*, 440 U.S. at 385-388.[12]. After *Scott*, the dissent in *Baldasar* argued that the *Baldasar* decision would also

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[12] In a footnote to this paragraph the dissent listed the following authority:

> Alaska: Alaska Const., Art. 1, §11; Alaska Stat. Ann. §18.85.100 (1974) (any offense punishable by incarceration; or which may result in loss of valuable license or heavy fine); *Alexander v. Anchorage*, 490 P.2d 910 (Alaska 1971); Arizona: Ariz. Rule Crim. Proc. 6.1(b) (any criminal proceedings which may result in punishment by loss of liberty; or where the court concludes that the interest of justice so requires); California: Cal. Penal Code Ann. §987 (West Supp. 1978) (all criminal cases); Connecticut: Conn. Gen. Stat. §§51-296(a), 51-297(f) (1979) (all criminal actions); Delaware: Del. Code Ann., Tit. 29, §4602 (1974) (all indigents under arrest or charged with crime if defendant requests or court orders); Hawaii: Haw. Rev. Stat. §802-1 (1976) (any offense punishable by confinement in jail); Indiana: Ind. Const. Art. I §13 (all criminal prosecutions); *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); Kentucky: Ky. Rule Crim. Proc. 8.04 (offenses punishable by a fine of more than $500 or by imprisonment); Louisiana: La. Code Crim. Proc., Art. 513 (West Supp. 1978) (offenses punishable by imprisonment); Massachusetts: Mass. Sup. Jud. Ct. Rule 3:10 (any crime for which sentence of imprisonment may be imposed); Minnesota: Minn. Stat. §§609.02, 611.14 (1978) (felonies and "gross misdemeanors"; statute defines "petty" misdemeanors as those not punishable by imprisonment or fine over $100); New Hampshire: N.H. Rev. Stat. Ann. §§604 – A:2, 625:9 (1974 and Supp. 1977) (offenses punishable by imprisonment); New Mexico: N.M. Stat. Ann. §41-22A-12 (Supp. 1975) (offense carrying a possible sentence of imprisonment); New York: N.Y. Crim. Proc. Law §170.10(3) (McKinney 1971) (all misdemeanors except traffic violations); *People v. Weinstock*,

place too great a burden on the court system. *See Baldasar* 446 U.S. at 234-235 (Justices Powell, White and Rehnquist

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80 Misc.2d 510, 363 N.Y. S.2d 878 (1974) (traffic violations subject to possible imprisonment); Oklahoma: Okl. Stat., Tit. 22, §464 (1969) (all criminal cases); *Stewart v. State*, 495 P.2d 834 (Cr. App. 1972); Oregon: *Brown v. Multnomah County Dist. Ct.*, 29 Or. App. 917, 566 P.2d 522 (1977) (all criminal cases); South Dakota: S.D. Comp. Laws Ann. §23-2-1 (Supp. 1978) (any criminal action); Tennessee: Tenn. Code Ann. §§40-2002, 40-2003 (1975) (persons accused of any crime or misdemeanor whatsoever); Texas: Tex. Code Crim. Proc. Ann., Art. 26.04 (Vernon 1966) (any felony or misdemeanor punishable by imprisonment); Virginia: Va. Code §§19.2-157, 19-2-160 (Supp. 1978) (misdemeanors the penalty for which may be confinement in jail); Washington: Wash. Justice Court Crim. Rule 2.11(a)(1) (all criminal offenses punishable by loss of liberty); West Virginia: W.Va. Code §62-3-1a (1977) (persons under indictment for a crime); Wisconsin: Wis. Const., Art. I, §7; *State ex rel. Winnie v. Harris*, 75 Wis.2d 547, 249 N.W.2d 791 (1977) (all offenses punishable by incarceration).

The dissent went on to note:

> Although the law is not unambiguous in every case, ambiguities in the laws of other States suggest that the list is perhaps too short, or at least that other States provide counsel in all but the most trivial offenses. E.g., Colorado: Colo. Rev. Stat. §21-1-103 (1973) (all misdemeanors and all municipal code violations at the discretion of the public defender); Georgia: Ga. Code §27-3203 (1978) (any violation of a state law or local ordinance which may result in incarceration); Missouri: Mo. Op. Atty. Gen. No. 207 (1963) (counsel should be appointed in misdemeanor cases of "more than minor significance" and "when prejudice might result"); Montana: Mont. Rev. Codes Ann. §95-1001 (1969) (court may assign counsel in



dissenting); this same fear has also been voiced in Fu, *High Crimes From Misdemeanors: The Collateral Use of Prior,*

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> misdemeanors "in the interest of justice"); Nevada: Nev. Rev. Stat. §178.397 (1977) (persons accused of "gross misdemeanors" or felonies); New Jersey: N.J. Stat. Ann. §2A:158A-2 (West 1971); N.J. Crim. Rule 3:27-1 (any offense which is indictable); Pennsylvania: Pa. Rules Crim. Proc. 316(a)-(c) (in all but "summary cases"); Wyoming: Wyo. Stat. §§7-1-110(a) (entitled to appointed counsel in "serious crimes"), 7-1-108(a)(v) (serious crimes are those for which incarceration is a "practical possibility"), 7-9-105 (all cases where accused shall or may be punished by imprisonment in penitentiary) (1977).
>
> . . .
>
> Several States that have not adopted the "authorized imprisonment" standard give courts discretionary authority to appoint counsel in cases where it is perceived to be necessary. (e.g., Maryland, Missouri, Montana, North Dakota, Ohio, and Pennsylvania).
>
> Justice Marshall also observed that of the States that did not provide counsel in all cases where any imprisonment was authorized many provided counsel when periods of imprisonment longer than 30 days, 3 months, or 6 months were authorized. He cited the following authorities:
> Iowa: Iowa Rules Crim. Proc. 2, §3; 42, §3;
> Maryland: Md. Ann. Code, Art. 27A, §§2(f) and (h), 4 (1976); Mississippi: Miss. Code Ann. §99-15-15 (1972).
> Idaho: Idaho Code §19-851 (Supp. 1978); *Mahler v. Birnbaum*, 95 Idaho 14, 501 P.2d 282 (1972); Maine: *Newell v. State*, 277 A.2d 731 (1971); Ohio: Ohio Rules Crim. Proc. 2, 44(A) and (B); Rhode Island: R.I. Rule Crim. Proc. 44 (Super. Ct.); R.I. Rule Crim. Proc. 44 (Dist. Ct.); *State v. Holliday*, 109 R.I. 93, 280 A.2d 333 (1971); Utah: Utah Code Ann. §77-64-2 (1978); *Salt Lake City Corp. v. Salt Lake County*, 520 P.2d 211 (1974).

*Uncounseled Misdemeanors Under the Sixth Amendment, Baldasar and The Federal Sentencing Guidelines*, 77 Minn. L. Rev. 165 (1992). In *Baldasar*, Justices Marshall, Brennan, and Stevens again pointed out that the fear of unacceptable economic burdens on state and local governments

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In footnote 22, Justice Marshall also observed:

> The following States appear to be governed by only the "likelihood of imprisonment" standard: Arkansas: Ark. Rule Crim. Proc. 8.2(b) (all criminal offense except in misdemeanor cases where court determines that under no circumstances will conviction result in imprisonment); Florida: Fla. Rule Crim. Proc. 3.111(b) (any misdemeanor or municipal ordinance violation unless prior written statement by judge that conviction will not result in imprisonment); North Carolina: N.C. Gen. Stat. §7A-451(a) (Supp. 1977) (any case in which imprisonment or a fine of $500 or more is likely to be adjudged); North Dakota: N.D. Rule Crim. Proc. 44 (all nonfelony cases unless magistrate determines that sentence upon conviction will not include imprisonment); Vermont: Vt. Stat. Ann., Tit. 13, §§5201, 5231 (1974 and Supp. 1977) (any misdemeanor punishable by any period of imprisonment or fine over $1,000 unless prior determination that imprisonment or fine over $1,000 will not be imposed). Two States require appointment of counsel for indigents in cases where it is "constitutionally required": Alabama: Ala. Code §§15-12-1, 15-12-20 (1975); South Carolina: S.C. Code §17-3-10 (Supp. 1977). Some States require counsel in misdemeanor cases only by virtue of judicial decisions reacting to *Argersinger*; Kansas: *State v. Giddings*, 216 Kan. 14, 531 P.2d 445 (1975); Michigan: *People v. Studaker*, 387 Mich. 698, 199 N.W.2d 177 (1972); *People v. Harris*, 45 Mich. App. 217, 206 N.W.2d 478 (1973); Nebraska: *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975).



was unlikely and speculative. *See Baldasar*, 446 U.S. at 229.[13]

A rule requiring appointment of counsel whenever imprisonment is "authorized" would certainly be consistent with the express provisions of the Sixth Amendment. It would resolve the problem of the use of unreliable, uncounseled misdemeanors for enhancement purposes and would be a clear standard for the lower courts to follow. It would be consistent with the American Bar Association and also be a logical extension of *Powell*,

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[13] In footnote 3, Justice Marshall noted:

> The dissent expresses concern that our decision will impose unacceptable economic burdens on state and local governments. *Post*, at 1592. I do not share that view. Not all misdemeanor defendants, of course, are indigent. See *Scott v. Illinois*, 440 U.S. 367, 385, and n. 16, 99 S.Ct. 1158, 1168, and n. 16, 59 L.Ed.2d 383 (1979) (BRENNAN, J., dissenting). Where the defendant is indigent, counsel will be provided in the first trial unless the prosecution does not seek a jail term. A great many States provide counsel in all cases where imprisonment is authorized, even though counsel is not constitutionally required. See *id.*, at 386-387, n. 18, 99 S.Ct., at 1168-1169, N. 18. Further, not all subsequent offenses are subject to enhancement, and not all previous offenses are predicate offenses for enhancement purposes. Thus the number of cases in which the State must decide whether to provide counsel solely to preserve its ability to enhance a subsequent offense will be only a fraction of the total. In many of those remaining cases, the judgment whether future misconduct is likely, and whether the first offense is serious enough to warrant its use for enhancement, will be a relatively easy exercise of prosecutorial discretion.

*Gideon* and *Argersinger*. If it involves some additional costs in providing counsel in some states, perhaps this is a cost made necessary by our notions of fairness and due process.

## CONCLUSION

For the reasons stated above, the judgment below should be reversed and the case remanded to the District Court for sentencing without consideration of the prior uncounseled misdemeanor or in the alternative that Petitioner's sentence be reduced by 25 months.

Respectfully Submitted,

WILLIAM B. MITCHELL CARTER
(Appointed by this Court)
CARTER, MABEE, PARIS & FIELDS
Suite 404, James Building
Chattanooga, Tennessee 37402
615/265-2367